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Attorneys for **Mr. Cedeno-Martinez**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

(**HONORABLE THOMAS J. WHELAN**)

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| UNITED STATES OF AMERICA,<br><br>Plaintiff,<br>v.<br>**MIGUEL CEDENO-MARTINEZ** (1),<br>JONATHAN ASTORGA-MADRIGAL (2),<br><br>Defendants.<br>_________________________________ | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | CASE NO. 07cr3270-TJW<br><br><br>STATEMENT OF FACTS AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTIONS. |

**I.**

## FACTUAL HISTORY[1]

On November 13, 2007, agents spotted a group of people running north from Mexico near the San Ysidro Port of Entry. An agent tracked these people and saw some of them tumble into a minivan. Agents detained eight people. Agents later arrested Mr. Miguel Cedeno-Martinez, who was sitting behind the wheel of the minivan, and Jonathan Astorga-Madrigal, whom agents believe guided the people across the border.

On December 4, 2007, the government secured a six-count indictment against Mr. Cedeno-Martinez and Mr. Astorga-Madrigal, alleging violations of 8 U.S.C. § 1324.

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[1]The following facts are based on information provided by the government. Mr. Cedeno-Martinez does not admit their accuracy and reserves the right to challenge them.

## II.

## MOTION COMPEL DISCOVERY

Mr. Cedeno-Martinez requests the following discovery. His request is not limited to those items that the prosecutor knows of. It includes all discovery listed below that is in the custody, control, care, or knowledge of any "closely related investigative [or other] agencies." *See United States v. Bryan*, 868 F.2d 1032 (9th Cir. 1989).

(1) Brady Information. The defendant requests all documents, statements, agents' reports, and tangible evidence favorable to the defendant on the issue of guilt and/or which affects the credibility of the government's case. Under *Brady v. Maryland*, 373 U.S. 83 (1963), impeachment as well as exculpatory evidence falls within the definition of evidence favorable to the accused. *United States v. Bagley*, 473 U.S. 667 (1985); *United States v. Agurs*, 427 U.S. 97 (1976).

(2) Any Proposed 404(b) Evidence. The government must produce evidence of prior similar acts under Fed. R. Crim. P. 16(a)(1) and Fed. R. Evid. 404(b) and any prior convictions which would be used to impeach as noted in Fed. R. Crim. P. 609. In addition, under Fed. R. Evid. 404(b), "upon request of the accused, the prosecution . . . shall provide reasonable notice in advance of trial . . . of the general nature" of any evidence the government proposes to introduce under Fed. R. Evid. 404(b) at trial. The defendant requests notice two weeks before trial to give the defense time to investigate and prepare for trial.

(3) Request for Preservation of Evidence. The defendant requests the preservation of all physical evidence that may be destroyed, lost, or otherwise put out of the possession, custody, or care of the government and which relate to the arrest or the events leading to the arrest in this case. This request includes, but is not limited to, the results of any fingerprint analysis, the defendant's personal effects, and any evidence seized from the defendant or any third party.

(4) Defendant's Statements. The defendant requests disclosure and production of all statements made by the defendant. This request includes, but is not limited to, the substance

of any oral statement made by the defendant, Fed. R. Crim. P. 16(a)(1)(A), and any written or recorded statement made by the defendant. Fed. R. Crim. P. 16(a)(1)(B)(i)-(iii).

(5) Tangible Objects. The defendant seeks to inspect and copy as well as test, if necessary, all other documents and tangible objects, including photographs, books, papers, documents, alleged narcotics, fingerprint analyses, vehicles, or copies of portions thereof, which are material to the defense or intended for use in the government's case-in-chief or were obtained from or belong to the defendant. Fed. R. Crim. P. 16(a)(1)(E).

(6) Expert Witnesses. The defendant requests the name, qualifications, and a written summary of the testimony of any person that the government intends to call as an expert witness during its case in chief. Fed. R. Crim. P. 16(a)(1)(G).

(7) Witness Addresses. The defendant requests access to the government's witnesses. Thus, counsel requests a witness list and contact phone numbers for each prospective government witness. Counsel also requests the names and contact numbers for witnesses to the crime or crimes charged (or any of the overt acts committed in furtherance thereof) who will not be called as government witnesses.

(8) Jencks Act Material. Mr. Cedeno-Martinez requests production in advance of trial of material discoverable under the Jencks Act, 18 U.S.C. § 3500. Advance production will avoid needless delays at pretrial hearings and at trial. This request includes any "rough" notes taken by the agents in this case. This request also includes production of transcripts of the testimony of any witness before the grand jury. *See* 18 U.S.C. § 3500(e)(1)-(3).

(9) Informants and Cooperating Witnesses. Mr. Cedeno-Martinez requests disclosure of the name(s), address(es), and location(s) of all informants or cooperating witnesses used or to be used in this case, and in particular, disclosure of any informant who was a percipient witness in this case or otherwise participated in the crime charged against Mr. Cedeno-Martinez. *Roviaro v. United States*, 353 U.S. 52, 61-62 (1957). The government must disclose any information derived from informants which exculpates or tends to exculpate Mr. Cedeno-Martinez. *Brady v. Maryland*, 373 U.S. 83 (1963). The government must disclose any information indicating bias on the part of any informant or cooperating witness. *Id.*

(10) **Specific Discovery Requests**

**a. request for access to a-files.**

Mr. Cedeno-Martinez requests access to the immigration, or "A-File," of the material witnesses involved in this case. *See* Fed. R. Crim. P. 16 (1)(E)(i).

**b. request for disclosure of co-defendant's statement.**

Mr. Cedeno-Martinez requests a copy of the videotape of his co-defendant's statement to agents. Particularly given the government's allegation of aiding and abetting, this is discoverable under Fed. R. Crim. P. 16 (1)(E)(i)-(ii).

**c. information regarding the released material witnesses**

Mr. Cedeno-Martinez requests discovery and contact information regarding the released material witnesses. As percipient witnesses, their identities are discoverable. *Cf. Roviaro v. United States*, 353 U.S. 52, 61-62 (1957). Moreover, as the government is responsible for putting these material witnesses beyond the reach of defense counsel, it is incumbent on the government to provide information that may lead to the defense being able to contact them. *See* Fed. R. Crim. P. 16 (1)(E)(i).

(11) Residual Request. Mr. Cedeno-Martinez intends by this discovery motion to invoke his rights to discovery to the fullest extent possible under the Federal Rules of Criminal Procedure and the Constitution and laws of the United States.

## III.

## MOTION TO SUPPRESS STATEMENTS

### 1. Introduction

Mr. Cedeno-Martinez moves to suppress statements made by to Agent Byfield on the basis of a *Miranda* violation. The violation of Mr. Cedeno-Martinez's *Miranda* rights took three forms.[2] First, before advising Mr. Cedeno-Martinez of his rights under *Miranda*, immigration officials had earlier advised him of his "administrative rights." Because these

[2]The facts in this motion are from defense counsel's review of the video of M. Cedeno-Martinez's statement to agents.

administrative rights affirmatively advise a person that an attorney will not be provided for them free of cost, the later *Miranda* warnings were confusing.

Second, although agents advised Mr. Cedeno-Maritinez of his right to contact the Mexican Consulate, when Mr. Cedeno-Martinez requested to do so, agents told him that he could do so *after* speaking with them.

Third, when advising Mr. Cedeno-Martinez of his rights under *Miranda*, agents explained to Mr. Cedeno-Martinez that if he did not have the funds to hire a lawyer "one can be assigned." This advisal falls short of the explicit requirement that agents make sure a suspect make a knowing and voluntary waiver of their rights under *Miranda*. For these reasons, both independently and combined, Mr. Cedeno-Martinez never knowingly and voluntarily waived his *Miranda* rights.

**2. General legal principles**

"For inculpatory statements made by a defendant during custodial interrogation to be admissible in evidence, the defendant's waiver of Miranda rights must be voluntary, knowing, and intelligent." *United States v. Garibay*, 143 F.3d 534, 536 (9th Cir. 1998) (internal quotation marks omitted). The government bears the burden of demonstrating a waiver of a person's *Miranda* rights by a preponderance. *Id.* "The government's burden to make such a showing is great, and the court will indulge every reasonable presumption against waiver of fundamental constitutional rights." *Id.* (internal quotation marks omitted).

"What *Miranda* requires is meaningful advice to the unlettered and unlearned in language which [they] can comprehend and on which [they] can knowingly act. In order for the warning to be valid, the combination or the wording of its warnings cannot be affirmatively misleading. The warning must be clear and not susceptible to equivocation." *United States v. San Juan-Cruz*, 314 F.3d 384, 387 (9th Cir. 2002) (internal quotation marks and citations omitted) (brackets in original).

**2. *San Juan-Cruz* requires suppression**

To be valid, *Miranda* warnings must be clear and not confusing. *San Juan-Cruz*, 314 F.3d at 387. As the Ninth Circuit has held: "When one is told clearly that he or she does not have the right to a lawyer free of cost and then subsequently advised, '[i]f you can't afford a lawyer, one will be appointed for you,' it is confusing." *Id*. at 388. This is the situation here.

As in *San Juan-Cruz*, before agents advised Mr. Cedeno-Martinez of his rights under *Miranda*, agents had advised Mr. Cedeno-Martinez of his "administrative rights." These "administrative rights" do not provide for appointed counsel, but rather affirmatively state that a person is not entitled to appointed counsel. As was the case in *San Juan-Cruz*, because of the earlier "administrative rights" warning, the later *Miranda* warnings were not sufficiently clear to provide a clear advisal of Mr. Cedeno-Martinez's rights under *Miranda*. *See San Juan-Cruz*, 314 F.3d at 387-90.

Although agents did advise Mr. Cedeno-Martinez that his "administrative rights" no longer applied before questioning him, there is nothing in the agent's advisal to indicate that Mr. Cedeno-Martinez understood that the earlier warning that he did not have the right to an appointed attorney no longer applied. In *San Juan-Cruz*, the Ninth Circuit did note that the officer there "could have rectified the situation easily by clarifying his statements or advising San Juan to disregard the Administrative Rights in favor of those that were read to him under Miranda . . . ." *San Juan-Cruz*, 314 F.3d at 398. Here, however, agents did neither.

Rather, in a display of oblique bureaucratic speak, an agent asked whether he understood "more or less" that his earlier administrative rights no longer applied and that Mr. Cedeno-Martinez was not going to be given a voluntary return to Mexico. From this it is at least equally likely that Mr. Cedeno-Martinez understood that his rights regarding a *voluntary return*, not his rights at an immigration hearing, no longer applied. Notably, agents never told Mr. Cedeno-Martinez to "disregard" the "administrative rights" earlier read to him "in favor of those" under *Miranda*. *See San Juan-Cruz*, 314 F.3d at 398. The agents' retraction of Mr. Cedeno-Martinez's "administrative rights" did not act to fully inform Mr. Cedeno-Martinez "what the nature of his rights was under the Fifth Amendment." *Id*.

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**3. Agents violated Mr. Cedeno-Martinez's right to contact the Mexican Consulate**

Immediately following this confusing retraction of Mr. Cedeno-Martinez's administrative rights, agents advised Mr. Cedeno-Martinez of his right to contact the Mexican Consulate. Despite Mr. Cedeno-Martinez's request to do so, agents tell Mr. Cedeno-Martinez that he can call the consulate when the agents get a chance. This chance apparently did not arise until after agents interrogated Mr. Cedeno-Martinez.

Under the Vienna Convention, Mr. Cedeno-Martinez had a right to have agents notify the Mexican Consulate, "without delay," of his arrest. *United States v. Lombera-Camorlinga*, 206 F.3d 882, 884 (9th Cir. 2000) (*en banc*). Here, agents informed Mr. Cedeno-Martinez of his rights to speak to the Mexican Consulate, but when Mr. Cedeno-Martinez tries to exercise his rights agents do not immediately, as required by the treaty, call the consulate. Rather, agents specifically tell Mr. Cedeno-Martinez they will call the consulate when they have the time, and continue to interrogate Mr. Cedeno-Martinez. Indeed, according to a report provided by the government in discovery, it was not until about *five hours* after Mr. Cedeno-Martinez's request to speak with a consular official that agents actually respected that request. Of course, by that time, agents had long ago finished interrogating Mr. Cedeno-Martinez.

Although suppression of statements is not, under Ninth Circuit law, a remedy for a violation of the Vienna Convention's right to speak with a consular official, *see Lombera-Camorlinga*, 206 F.3d at 889 (*en banc*), the agents' violation of Mr. Cedeno-Martinez's consular rights is nonetheless relevant here.[3] It was after this violation that agents gained a putative waiver from Mr. Cedeno-Martinez of his rights under *Miranda*. The agents' disregard for Mr. Cedeno-Martinez's request to speak with a consular official is a circumstance the Court should take into consideration when deciding whether Mr. Cedeno-Martinez knowingly and voluntarily waived his rights under *Miranda*. *See Garibay*, 143

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[3]Mr. Cedeno-Martinez does believe that suppression should be the remedy for such a violation, but recognizes this Court is bound by *United States v. Lombera-Camorlinga*, 206 F.3d 882 (9th Cir. 2000) (*en banc*).

F.3d at 535 ("In reviewing the totality of circumstances in which Garibay was interrogated, it is clear that he was not aware of the nature of the constitutional rights he was waiving, and that the district court clearly erred in finding that he knowingly and intelligently waived his *Miranda* rights.").

For a man in Mr. Cedeno-Martinez's position—a man with no criminal record and a Fifth grade education—the agents telling him that he had a right to speak with someone, and then not honoring that request, would be quite confusing. Mr. Cedeno-Martinez's request to speak with someone indicates his hesitancy of deal with the agents without some type of counsel, *c.f. Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981), the agents' refusal to promptly honor his request is a factor this Court must consider.

**4. The *Miranda* rights given were insufficient**

Compounding the problems with the agents "retraction" of Mr. Cedeno-Martinez's administrative rights, and the agents not fulfilling their obligation to immediately contact a consular representative, the agents' actual *Miranda* warnings were confusing.

In a rapid recitation of rights under *Miranda*, agents inform Mr. Cedeno-Martinez that if he cannot afford an attorney, one will be assigned to him. An agent then instructs Mr. Cedeno-Martinez to put his initials on a form to indicate that he understands his rights. Coming as this does after the agents' earlier actions, there is no fair assurance that Mr. Cedeno-Martinez did indeed understand that an attorney would be *appointed* to him at no charge immediately if he requested.

**5. Conclusion**

For the reasons discussed above, both independently and combined, Mr. Cedeno-Martinez never knowingly and voluntarily waived his *Miranda* rights. Because he did not, the government may not use those statements made by him. *See Garibay*, 143 F.3d at 536.

## IV.

## MOTION FOR LEAVE TO FILE FURTHER MOTIONS

Mr. Cedeno-Martinez has received 194 pages of discovery. He requests leave to file further motions if necessary.

## V.

## CONCLUSION

Mr. Cedeno-Martinez requests this Court grant his motions.

Respectfully submitted,

Dated: January 22, 2008

/s/ Robert H. Rexrode
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